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IN THE

Supreme Court of the United States

October Term, 1965.

No. 818

GEORGE HOPSON and REBECCA B. REYNOLDS, Administratrix of the Estate of FREDERICK CLEMENT REYNOLDS, Deceased,

Petitioners,

v.

TEXACO, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, George Hopson and Rebecca B. Reynolds, Administratrix of the Estate of Frederick Clement Reynolds, Deceased, respectfully pray that a Writ of Certiorari issue to review the final judgments of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled matters on September 15, 1965.

OPINIONS OF THE COURTS BELOW.

No opinion was filed by the District Court for the Eastern District of Virginia; the Court's ruling on defendants' motion for directed verdict appears *infra*, pp. 4a-8a. The opinion of the Court of Appeals for the Fourth Circuit is reported at 351 F. 2d 415 (*infra*, pp. 9a-34a).

JURISDICTION.

The judgments of the Court of Appeals were entered on September 15, 1965 (*infra*, pp. 35a-38a). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTION PRESENTED.

Where two seamen became ill in a foreign port, and the ship's captain invoked the services of a transportation company, regularly employed by the shipowner for the shuttling of its employees in the area, to transport him and the two seamen to the American Consul to have the seamen "signed off" so that they could be repatriated to the United States for treatment, is the shipowner liable for the negligence of the transportion company which caused death and personal injury enroute, under the "operational activities" theory enunciated in *Sinkler v. Missouri Pacific R. R.*, 356 U. S. 326, 2 L. Ed. 2d 799 (1958)?

STATUTES INVOLVED.

The statutory provisions involved are Merchant Marine (Jones) Act, 46 U. S. C. A. 688; Federal Employers' Liability Act, 45 U. S. C. A. 51, 55; Shipping Act, 46 U. S. C. A. 682. They are printed in Appendix A *infra*, pp. 1a-3a.

STATEMENT OF THE CASE.

The undisputed facts, as related by the Court below, disclose as follows. Two American seamen, George Hopson and Frederick Reynolds, fell ill on their tanker vessel, the S/S "Texaco Wisconsin", while it was loading petroleum in the foreign port of Trinidad. Rather than have the men continue on the voyage, the captain decided to discharge them from the vessel and return them to the United States for treatment. In order to effect the discharge of the seamen, the master, as required by statute, engaged a regularly employed taxicab company to transport himself and the two seamen to the United States Consul in Port of Spain, some thirty-eight miles away. Respondent, Texaco, had a standing arrangement with the cab company for the transportation of persons beyond the refinery enclosure, pursuant to which the cabs were used on a daily basis and were regularly available to the ship captains for transportation of seamen to Texaco's infirmary, about five miles away, and to the American Consul, some thirty-eight miles away, for the purpose, *inter alia*, of terminating the service of seamen from the vessels before the American Consul as required by statute, 46 U. S. C. A. § 682.

On this occasion, while the cab was enroute to the Consul, it came into collision with a truck, as a result of the cab driver's negligence, causing the captain and Reynolds to be killed and Hopson to be seriously injured.

Suit was brought by Hopson and Reynolds' personal representative. In that action, the court submitted the case to the jury on the theory that the taxicab company was an "agent" of respondent Texaco, within the meaning of the Jones Act (which incorporates the Federal Employers' Liability Act), because it was engaged in "operational activities" in behalf of Texaco; that, therefore, any negligence of the cab company was imputable to Texaco.

Respondent conceded that Hopson and Reynolds were in the ship's service at the time of the collision. Respondent

urged, however, that the transportation of the master and the two seamen to the Consul's office was "simply a collateral activity" and not an "operational activity" and "had nothing to do with the actual operation of the ship"; that, therefore, the cab company was an independent contractor for whose negligence Texaco was not responsible.

The trial court held that, on the authority of the Supreme Court's decision in *Sinkler v. Missouri Pacific R. R.*, 356 U. S. 326, 2 L. Ed. 2d 799 (1958), the cab company was engaged in operational activity, and so charged the jury. The jury rendered a verdict of $45,000.00 in favor of Hopson and $75,000.00 in favor of the widow and dependents of Reynolds.

The Court of Appeals, in a split decision, reversed. The majority, Judges Boreman and Bryan, held the taxicab company was engaged in collateral activity for respondent "not a part of Texaco's enterprise" and having "nothing to do with the actual operation of the ship", and that the cab company was an independent contractor, for whose negligence Texaco was not liable.

Judge Sobeloff, dissenting, said that the case fell clearly within the rule of *Sinkler v. Missouri Pacific R. R., supra,* which, he stated, "emphasizes that an 'accommodating scope' must be given to the word 'agents' in order to effectuate the purposes of the Federal Employers' Liability Act";[1] that Texaco was required by law to provide medical care for its ill seamen; that Texaco's ships could not sail without Consular certification; and that these activities were clearly an essential part of Texaco's shipping enterprise, falling clearly within the term "operational activity". Judge Sobeloff further reasoned that the majority erred in relying upon two pre-*Sinkler* cases, rather than the broad language of the *Sinkler* decision itself and the post-*Sinkler* decisions, in applying the "operational activities" standard.

1. The Federal Employers' Liability Acts were incorporated into the maritime law by the Jones Act, 46 U. S. C. A. § 688.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I. The Decision Below That a Steamship Company Is Not Liable for the Negligent Conduct of a Transportation Service Engaged to Shuttle Its Seamen Falling Ill in a Foreign Port to an Infirmary and to the American Consul to Have Them Discharged From the Vessel for Repatriation to the United States Is in Direct Conflict With the Ruling of This Court in *Sinkler v. Missouri Pacific R. R.*, 356 U. S. 326, Holding That All Those Engaged in Furtherance of the Employer's Business Are Engaged in Operational Activities of the Employer and Are His "Agents" Within the Meaning of the Jones Act.

The crucial point here is whether the transportation company engaged by the respondent to shuttle its seamen to the infirmary and to the American Consul, *inter alia*, is an "agent" within the meaning of the Federal Employers' Liability Act, 45 U. S. C. A. § 51. In *Sinkler v. Missouri Pacific R. R.*, 356 U. S. 326, 2 L. Ed. 2d 799 (1958), the Supreme Court recognized that although, under the common law, there was an abundance of authority which would hold the railroad liable for the independent contractor's activities involving the railroad's enterprise, Mr. Justice Brennan pointed out that the term "agent" in the Act was far broader than anything contemplated in the common law and had to be given an "accommodating scope", in order to embrace all independent contractors and all workers engaged in the common pursuit of the railroad's business, no matter by whom employed. Despite this express mandate, the Court below restricted the term "agent" to those who were engaged in the "actual operation" of the vessel. As Judge Sobeloff pointed out in his dissenting opinion, this is "too narrow a view of the Supreme Court's holding in *Sinkler*". More specifically, Judge Sobeloff points out

that the majority's opinion would unduly restrict the "operational activities" of the respondent shipowner to those matters dealing solely with "manipulation of ship's gear".

The lower court's description of the ship's business or enterprise in this respect conflicts not only with the express language of *Sinkler,* but with the long-standing, well-recognized scope of the ship's business. The vessel's enterprise includes not only those who "hand, reef and steer", but all those who are engaged in any form of activity which is pursuant to the vessel's enterprise. They are engaged just as much in the ship's business or enterprise as those who actually navigate the vessel from the bridge. Thus, on a vessel, a telephone operator (*Keefe v. Matson Nav. Co.,* 46 F. 2d 123 (W. D. Wash., N. D. 1930)); a bartender (*The J. S. Warden,* 175 Fed. 314 (S. D. N. Y. 1910)); a confectionery counter man (*Conner v. The Ship Flora,* 6 Exq. Ct. Rpts. (Can.) 151); a musician (*The Sealark,* 14 F. 2d 201 (D. Wash. 1926)); and an oil well driller (*Gianfala v. Texas Co.,* 350 U. S. 879, 100 L. Ed. 775 (1955)) act in furtherance of the ship's enterprise, although they are quite removed from the actual manipulation of the ship's gear or the navigation of the vessel. Where the vessel is a dredge engaged in deepening a channel, although it has no motive power of its own, all those engaged in that activity, even though only manual labor is involved, are engaged in furtherance of the ship's business and are, therefore, "seamen" with the same rights as those who actually navigate the vessel (*Lawrence v. Norfolk Dredging Co.,* 319 F. 2d 805 (4th Cir. 1963)). In sum, the ship's enterprise may involve many different facets of work, quite apart from the actual navigation of the vessel and the manipulation of the ship's gear. But, it is clear that all these activities are embraced within the scope of the ship's enterprise.

An integral, vital part of the ship's business is the duty to care for all seamen falling ill in the service of the vessel. *Cortes v. Baltimore Insular Line,* 287 U. S. 367, 77 L. Ed. 368 (1932). This obligation does not end with

the voyage or with the seaman's discharge. On the contrary, as Judge Maris stated in *Calmar S. S. Corp. v. Taylor,* 92 F. 2d 84 (3d Cir. 1937):

> "The underlying basis for the rule requiring the provision of maintenance and cure is one of common humanity. A seaman rendered helpless in the service of his ship may not be cast adrift, but must be cared for at the ship's expense so long as care is reasonably required and may be effective in checking his malady or curing his wounds and restoring his health." (92 F. 2d at 87.)

Indeed, the obligation to furnish and provide maintenance and cure extends beyond the voyage and beyond the confines of the ship. In *Sims v. United States,* 186 F. 2d 972 (3d Cir. 1951), *cert. den.,* 342 U. S. 816, 96 L. Ed. 617, the Court awarded damages for the failure to provide maintenance and cure after the seaman left the vessel and went ashore. In *Murphy v. American Barge Line Co.,* 169 F. 2d 61 (3d Cir. 1948), the court said:

> "If hospitalization was the way in which the obligation of maintenance and cure was to be fulfilled, this would mean, we think, that there was a duty to provide means to get the man there. He was no longer an employee of the respondent, it is true, but the duty of maintenance and cure did not stop with his discharge. Loverich v. Warner Co., 3 Cir., 1941, 118 F. 2d 690, certiorari denied 1941, 313 U. S. 577, 61 S. Ct. 1104, 85 L. Ed. 1535. A hospital ticket without more under these circumstances does not discharge the obligation since we think the instant case represents a situation where the offer to provide hospitalization must include the means by which the injured seaman can get to the hospitalization suggested." (169 F. 2d at 64.)

So strong is the obligation to care for sick or injured seamen that the ship is required even to change its course,

at great expense, in order to obtain proper medical care and attention for the seamen. *DeZon v. American President Lines,* 318 U. S. 660, 667-68, 87 L. Ed. 1065, 1071 (1943).

It is significant to note in this connection that when a seaman signs on a vessel, he surrenders his personal liberty for the duration of the voyage and his contract in this respect is the only one which does not fall within the proscription of the Thirteenth Amendment. *Robertson v. Baldwin,* 165 U. S. 275, 41 L. Ed. 715 (1897). A corresponding duty is placed on the shipowner to safeguard the seamen to the fullest extent. *Id.*

Thus, the duty to provide and maintain a seaman is an integral part of the ship's business, and the obligation continues even after the man has been discharged from the vessel.

In this case, the seamen were admittedly still in the service of the vessel, and, indeed, the same transportation service had taken them to the infirmary on behalf of respondent two days before the accident. When the respondent finally concluded to have the men discharged from the vessel so that they could be repatriated to the United States for treatment, the captain of the ship himself called upon the same transportation service to take him and the two ailing seamen to the United States Consul, where, in accordance with the statute, 46 U. S. C. A. § 682, he could "sign them off" the ship's articles and thereafter arrange for their care and transportation back to the United States. It was while the captain, with the two seamen, was enroute to the Consul's office—and while still admittedly in the ship's service—the tragic accident occurred, killing Reynolds and maiming Hopson. Clearly, the trip to the Consul's office was very much a vital part of the ship's total operations. As Judge Sobeloff pointed out, the seamen could not be signed off in the foreign port without Consular certification, and the ship could not have sailed without that certification. The transportation of the seamen, either for treatment or for signing off ship's articles or for repatriation to the

United States, all directly involve the ship's business, and all who were engaged in effecting those objectives were performing the service for the respondent shipowner. The circumstances in this case fall within the accommodating scope of operational activities, thereby making the transportation company an agent within the meaning of the FELA and the Jones Act, as defined in *Sinkler*. Judge *Sobeloff*, in his dissenting opinion, eloquently summed it up, as follows:

> "Texaco's ships could not sail without consular certifications, and Texaco was required to provide medical care for its ill seamen. Thus these activities were clearly an essential part of its total shipping enterprise, and bringing the master and the sick seamen to the consul that morning falls within the term 'operational activity.' This term is not limited to the manipulation of the ship's gear. It includes the recruitment of the crew and furnishing of maintenance and cure to seamen when ill. It is no undue extension of the term to include the transporting of seamen to the consulate preparatory to their discharge for repatriation. Caring for these ill seamen was no less an operational activity because it was not to be performed aboard the vessel.
>
> "The fortuitous circumstance that the shipowner maintained its own vehicles for some purposes and had steady arrangements with two taxicab owners to run various errands between the pier and the consul's office, which is located at a somewhat greater distance, instead of using its own vehicles for all purposes, should not alter the responsibility of the ship. When a seaman becomes ill he is particularly in the master's care. In fact, the very trip that resulted in tragedy was an essential preliminary step in the performance of the inescapable duty of maintenance and cure." (*Infra*, pages 28a-29a)

II. The Decision of the Fourth Circuit Court of Appeals Below Conflicts With the Decisions of Other Circuits, Including the Third Circuit's Decision in *Carney v. Pittsburgh & Lake Erie R. R.*, 316 F. 2d 277 (1963), and the Fifth Circuit's Decision in *Southern Ry. v. Fox*, 339 F. 2d 560 (1965).

Instead of following the clear mandate of the Supreme Court in *Sinkler*, the Court below erroneously relied on two cases which preceded the *Sinkler* decision and which are in clear conflict with it. By a process of tortured reasoning, the lower court attempted to bring the *Sinkler* decision into line with the pre-*Sinkler* cases—*McCall v. Overseas Tankship Corp.*, 222 F. 2d 441 (2d Cir. 1955) and *Premeaux v. Socony-Vacuum Oil Co.*, 187 S. W. 2d 690 (Tex. Civ. App. 1945). Although these two cases are clearly distinguishable on the facts, as Judge Sobeloff pointed out, nevertheless, they must be completely subordinated to the *Sinkler* decision. The lower court committed serious error in attempting to analyze *Sinkler* against the background of *McCall* and *Premeaux*, and to attempt to bring *Sinkler* into line with reasoning in those cases.

The Court below conceded that its decision was in conflict with several post-*Sinkler* decisions, including *Carney v. Pittsburgh & Lake Erie R. R.*, 316 F. 2d 277 (3d Cir. 1963), *cert. den.*, 375 U. S. 814, and *Leek v. Baltimore & Ohio R. R.*, 200 F. Supp. 368 (N. D. W. Va. 1962). Both the *Carney* and the *Leek* cases were decided after and in reliance upon the *Sinkler* decision. In *Carney*, the railroad arranged for Carney and his fellow workers to stay at the YMCA during the work week. Judge Sobeloff analyzed the *Carney* decision and its relevance to the facts at bar in these terms:

> "There is no valid ground on which to distinguish the instant case from *Carney v. Pittsburgh & Lake Erie R. R. Co.*, 316 F. 2d 277 (3d Cir. 1963). There the defendant railroad had a project near Youngstown, Ohio,

on which the plaintiff was working. Rather than transfer the worker to Youngstown—where he could pay his own expenses—the railroad agreed to pay his room and board at the local YMCA. This arrangement with the railroad accounted for no more than 3% of the use of the Y's facilities. The employee was injured when he fell from a negligently maintained bed in the Y, and the railroad was held responsible on the theory that the Y was its agent. The court said:

> "'[I]n supplying those services to plaintiff with the railroad, [the Y] was performing "operational activities" of plaintiff's employer * * *. He was there under the specific agreement with his employer that he would retain his out of town status and that the railroad would pay for his living expenses.' 316 F. 2d at 279.

"It is noteworthy that Carney could sleep in the Y or not, as he desired, while Hopson and Reynolds had no voice in the selection of the means used to effectuate their discharge and repatriation." (*Infra*, pages 29a-30a)

The *Carney* decision discloses a clear conflict between the Third Circuit, which decided that case, and the Fourth Circuit in the instant case, involving a basic interpretation of the *Sinkler* decision, which goes to the very heart of the "operational activities" theory.

In an effort to distinguish the *Carney* case, the Court below injected a unique element into its reasoning; namely, that in *Carney*, the railroad "benefited" from the YMCA services. Judge Sobeloff answered this contention, as follows:

> "Nor can Texaco be absolved on the ground that it did not stand to 'benefit' from taking Hopson and Reynolds to the consul, for it cannot possibly be maintained that the performance of its statutory duty to the men was not beneficial to it. Surely no test of opera-

> tional activity is acceptable which inquires only whether the employer is directly benefited and rules out whatever benefits the employees. It is enough that the employer benefits from the employees' services as members of the crew. An employer will not be permitted to say that only what brings him direct profit is covered by the law, disregarding his concomitant obligation to the employees. The stark simplicity of the proposed test is insensitive to the underlying policy of the FELA and the Jones Act." (*Infra*, page 30a)

The case of *Leek v. Baltimore and Ohio R. R.*, 200 F. Supp. 368, 370 (N. D. W. Va. 1962), decided within the Fourth Circuit and not disavowed by the Court below, is set out in the dissenting opinion, as follows:

> "Within our own circuit, the transportation of workmen to and from their place of employment was recently held to be an 'operational activity.' *Leek v. Baltimore & Ohio R. R. Co.*, 200 F. Supp. 368, 370 (N. D. W. Va. 1962). The case was not appealed. There a railroad employee was permitted to recover under FELA for injuries sustained through the negligent operation of a taxicab provided by the railroad to take employees home at the end of the day. Similarly, taking the ill seamen to the consul for discharge and repatriation is an operational activity without which a ship cannot function as the statute requires. There is no legally significant difference between the transportation of an employee by an employer when he is released for the day and the transportation of crewmen preparatory to their discharge. Indeed, if there were any distinction, the present case would seem the stronger of the two." (*Infra*, pages 30a-31a)

Reference is also made by Judge Sobeloff to *Mangrum v. Union Pacific R. R.*, 41 Cal. Rptr. 536 (Dist. Ct. App. 1964), which the Court below did not find "even slightly persuasive", but which was found to the contrary by Judge Sobeloff, in these terms:

"A most exhaustive analysis of the *Sinkler* doctrine is found in *Mangrum v. Union Pacific R. R. Co.*, 41 Cal. Rptr. 536, 543-48, — P. 2d —, — (Dist. Ct. App. 1964). There a railroad was held liable for the negligence of a doctor retained by the employer to treat an ill employee. Although the doctor was a private practitioner on the staff of four different hospitals, received no salary from, and was subject to no control by, the railroad, it was held:

> " 'The doctor was engaged in an operational activity of the railroad, one necessary to carry out its franchise, * * * *for a railroad cannot operate properly without a full healthy crew.*' " Id. at 548, — P. 2d at —. (Emphasis added.)

"And the railroad was required to answer for the doctor's conduct as an 'agent.' Similarly, the S. S. TEXACO WISCONSIN could not function without a healthy crew. The trip to Port-of-Spain to arrange for discharge of the ill seamen with a view to medical care was so intimately related to this function as to make it an operational activity and to make Abhiram an FELA agent." (Emphasis in original.)

In *Southern Ry. v. Fox, supra*, a railway employee was injured in the operation of a mimeograph machine. The A. B. Dick Company, the manufacturer, undertook to instruct the plaintiff in the operation of the machine. The accident resulted from the negligence of the A. B. Dick Company employee. The Court of Appeals for the Fifth Circuit held on the basis of the *Sinkler* decision that the railroad was vicariously liable for the actions of the A. B. Dick Company. This case discloses a conflict between the Fifth Circuit and the Fourth Circuit in the interpretation of the operational activities theory, as defined in *Sinkler*.

In justification for its narrow interpretation of *Sinkler*, the Court below stated that it was virtually impossible for a shipowner to carry its own shore-side means of transporta-

tion from one port to another. Judge Sobeloff, answering this contention, pointed out:

> "My brethren take 'judicial notice' that it is 'virtually impossible for a shipowner to carry its own shore-side means of transportation from one port to another or for it to own, operate, or control shore-side transportation facilities in every port and every part of the world.' Preliminarily, it is to be noted that the defendant did have vehicular facilities at Point-a-Pierre, where it maintained a large refinery, shipping office, pier and other installations, and made use of its customary arrangement with Abhiram on the date of the collision.
>
> "But more to the point, it is not unfair to suggest that a court should take judicial notice that the sick seamen were in a far less favorable position than their employer to arrange independent means of transportation to the consulate. Hopson and Reynolds were not on a mission of their own and the choice of means was not theirs. Their dependence upon the master was not a whit less in the car than at sea." (*Infra,* page 32a)

CONCLUSION.

Judge Sobeloff, in his dissenting opinion reasons:

> "The proper approach in Jones Act cases was expounded over thirty years ago by Justice Cardozo for a unanimous Court:
>
> > " 'The Act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings.' *Cortes v. Baltimore Insular Line,* 287 U. S. 367, 375 (1932).
>
> "This is the same philosophy taught by *Sinkler.* The language from *Cortes* which my brethren quote is, it

seems to me, misapplied. The Court's opinion did observe that 'the conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties.' The majority opinion seems to read Justice Cardozo's words as expressing a limitation of liability when a seaman is injured on land rather than aboard ship; but the entire context of the *Cortes* quotation makes clear that it was meant to enlarge, not contract, the protection afforded to seamen, for immediately thereafter the Court added, significantly, that '[o]ut of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.'

* * *

"In summary, Texaco having arranged with Abhiram and Chattergoon to serve its transportation needs between Point-a-Pierre and Port-of-Spain, rather than performing this work with its own vehicles, this carriage was an operational activity no less than the switching of cars in *Sinkler*, the transportation by taxicab in *Leek*, the use of the YMCA's beds in *Carney* and the doctor's services in *Mangrum*." (*Infra*, pages 32a-33a, 34a)

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Merchant Marine (Jones) Act, 46 USCA 688.

§ 688. Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located (41 Stat. 1007).

Federal Employers' Liability Act, 45 USCA 51, 55.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or

nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, § 5, Stat. 66.

Shipping Act, 46 USCA 682,

WAGES ON DISCHARGE.

§ 682. Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in sections 658, 683, 684, and 685 of this title. R. S. § 4580; June 26, 1884, c. 121, § 2, 23 Stat. 54.

APPENDIX B.

Ruling of Trial Judge on Defendants' Motion for Directed Verdict.

Appendix below, p. 140.

THE COURT: Gentlemen, this presents a very interesting question of law, which counsel have carefully briefed. Their briefs have been of great assistance to the Court. I believe the material facts can be stated briefly.

Mr. Hopson and Mr. Reynolds were seamen, employed by the defendant, Texaco, Incorporated, upon the S. S. TEXACO WISCONSIN. While in port, but offshore, at Trinidad, they became ill, and it was necessary to repatriate them.

Arrangements were made for a taxi cab to carry them to the United States Consul's Office in Port of Spain in order that the statutes pertaining to the repatriation of the seamen could be observed. The arrangements for the taxi cab were made by Texaco Trindad Corporation, which was the ship's agent at that point.

The taxi cab which the official of Texaco Trinidad Corporation called was not owned or controlled by Texaco Trinidad Corporation or the Texaco Company. However, the cab frequently responded to calls, possibly two or three times a week—some weeks perhaps more; some weeks less. The operator was paid by the trip and for his waiting time. Texaco Trinidad Corporation split its business between two taxi cab companies. The taxi cab company involved in this accident was not solely engaged by Texaco Trinidad. It had other customers.

The men, with the captain, entered the cab, and in the course of their trip to the United States Consul's Office, one of the plaintiffs was injured and the plaintiff's decedent in the Reynolds case was killed.

At the time of the accident, the men were in the employment of the defendant, Texaco, Incorporated. They were seamen on the ship, the TEXACO WISCONSIN. They were in the course of their employment while they traveled to the United States Consul's Office.

The plaintiff alleges that the negligence of the taxi driver, if any, can be imputed to the employer of the plaintiffs.

The defendant argues that its sole duty was the proper selection of the taxi cab and driver; that the taxi cab company was an independent contractor; and that under no theory of law can the negligence of the driver, if any, be imputed to them.

The leading case on the subject is *Sinkler v. Missouri Pacific R. R. Co.*, 356 U. S. 326 (1958). There, the Court gave a broad definition to the term "agents" as used in the FELA. The Court held an accommodating scope must be given to the word "agents" to give vitality to the standard governing the liability of carriers to their workers. The Court went on to say at 356 U. S. 331:

> "It is manifest that the corporate autonomy of the Belt Railway, and its freedom from detailed supervision of its operations by respondent, are irrelevant inasmuch as the switching crew of the Belt Railway Company at the moment of the collision in the station was engaged in furthering the operational activities of respondent. We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA."

The defendant has cited persuasive authority for the position it has taken. Certainly, the case of *Socony-Vacuum Oil Company v. Premeaux*, 187 S. W. 2d (Civ. App. Tex. 1945), appears to support the defendant's argument.

There, as you all know, a seaman sued for a breach of the obligation to provide him with maintenance and cure when he was repatriated on another vessel. The Texas Court concluded that the vessel repatriating him was an independent contractor. At 187 S. W. 2d 698, the Court said:

> "An independent contractor is not an officer, agent, or employee within the meaning of the Federal Employers' Liability Act, at least, where the employer's duty is not absolute."

That case was decided about thirteen years before *Sinkler.*

One of the leading cases the Texas Court relied on was *Robinson v. Baltimore and Ohio Railroad Company,* 237 U. S. 84.

In *Sinkler,* Mr. Justice Brennan stated, footnote 5, page 331 of Volume 356:

> "Respondent's reliance on *Robinson v. Baltimore and Ohio Railroad Company,* 237 U. S. 84—and citing another case—is misplaced. The issue in each of those cases is whether the plaintiff was an employee of the defendant railroad."

Dictum in *McCall v. Overseas Tankship Corporation,* 222 F. 2d 441 (2d Cir. 1955), also supports the defendant. Perhaps what is said there achieves the dignity of something beyond dictum, because Judge Learned Hand concurred on the ground that the airplane company which was repatriating the sailor was an independent contractor, and, therefore, its negligence was not to be imputed to the defendants. He went on to say: "It is not necessary to decide whether the plaintiff was still in the employment of defendant when he was killed;" and he preferred not to do so. The majority of the Court specifically points out, and it appears to this Court that their basis for deciding the case was, that the plaintiff had signed off; that he was no longer in the employ of the defendant as a seaman; and that he used the airplane at his own election after his employment

had ceased. So the holding in the case is certainly not controlling. There is language on page 444 of the report which indicates that the sole duty of the defendant was to use reasonable care in selecting a carrier. That, however, was not the basis upon which the case was actually decided.

McCall, it may be observed, cites *Premeaux* for the independent contractor theory. That case also was decided before *Sinkler.* Some three years before.

Quite recently, Judge Charles F. Paul in *Leek v. Baltimore & Ohio Railroad,* 200 Fed. Supp. 368 (N. D. W. Va., 1962), considered *Sinkler* and applied it to facts which, as we would expect, are not identical to the case at bar, but are of sufficient similarity to provide a discussion of the general principles which appear to control since the decision in *Sinkler.*

There, a taxi cab, which had no corporate relationship with the defendant; over a regular period of time, apparently day in and day out, picked up a crew after the crew had checked in; transported them to their place of work; picked up the crew that had been relieved and took them to the place where that crew could check out. The taxi charge for each round trip was $8.00 plus a waiting time in excess of one half hour. The taxi cab, apparently, was hired on the same basis as the taxi cab in the case at bar. An employee was injured. Judge Paul held that the employee could recover against the railroad.

The most recent case which has been called to the attention of the Court is *Carney v. Pittsburgh & Lake Erie Railroad Company,* 316 F. 2d 277 (3rd Cir. 1963). There, applying the principles expressed in Judge Paul's decision, among others, the Circuit Court allowed recovery to an employee of the railroad who was injured through the negligence of the Y. M. C. A.

Two general theories allowing recovery are mentioned in the cases. One, that the contractor falls within the classification of agents mentioned in Title 45, USC, Section 51. Two, that the defendant owes a nondelegable duty to pro-

vide reasonably safe facilities that his employee must use in the course of his employment.

A further theory is found in 45 USC, Section 55, which provides, in part:

> "Any contract, rule, or regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Of course, the same results could be reached under all three theories.

The Court is of the opinion that the decision in *Sinkler v. Missouri Pacific R. R. Co.*, 356 U. S. 326 (1958), controls the motion before this Court. Whether we adopt the theory of agency or nondelegable duty, or void the contract creating the independent relationship of the cab and the defendant, the same result is reached. For the purposes of this case, and under the facts of this case, the taxi cab was the responsibility of the defendant. The defendant's duty did not end with the selection of the cab, but the negligence, if any, of the cab driver should be imputed to the defendant.

The motion is overruled.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9668.

GEORGE HOPSON,

Appellee,

v.

TEXACO, INC.,

Appellant.

No. 9669.

REBECCA B. REYNOLDS, ADMINISTRATRIX OF THE ESTATE OF FREDERICK CLEMENT REYNOLDS, DECEASED,

Appellee,

v.

TEXACO, INC.,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued February 2, 1965. Decided September 15, 1965.)

Before SOBELOFF, BOREMAN and BRYAN, *Circuit Judges.*

HARRY E. MCCOY (SEAWELL, MCCOY, WINSTON & DALTON on brief) for Appellant, and C. ARTHUR RUTTER, JR., (AMATO, BABALAS, BREIT, COHEN, RUTTER & FRIEDMAN on brief) for Appellees.

BOREMAN, *Circuit Judge:*

These actions were brought under the Jones Act (46 U. S. C. A. § 688) to recover damages for personal injuries to a seaman and for the death of another as a result of an automobile accident on the Island of Trinidad. Verdicts and judgments were rendered against Texaco, Inc., in favor of the injured George Hopson and Rebecca Reynolds, the widow and personal representative of the deceased Frederick Reynolds. From these judgments Texaco appeals.

The facts are not in dispute. George Hopson and Frederick Reynolds were American seamen employed by Texaco aboard its ship, the S. S. Texaco Wisconsin, a large tanker engaged in transporting bulk petroleum products to various ports. On April 17, 1963, the Wisconsin was at Pointe-a-Pierre on the Island of Trinidad to take on a cargo of fuel at the Texaco-Trinidad corporation refinery which was a wholly owned subsidiary of Texaco and acted as the husbanding agent for the Wisconsin while it was in Trinidad. During the loading of the vessel, Hopson and Reynolds became ill and it became necessary to repatriate them rather than have them continue as crewmen on the Wisconsin and make the forthcoming voyage with the cargo of fuel to San Diego, California, via the Panama Canal. To effect the repatriation according to applicable statutes, the Master of the Wisconsin and the seamen had to appear before a United States Consul where the seamen would be officially discharged and paid their wages. The United States Consul's office was located in Port-of-Spain, thirty-eight miles north of Pointe-a-Pierre. To arrange transportation to Port-of-Spain, the Master of the Wisconsin contacted Texaco-Trinidad. As was customary when business was to be transacted outside the confines of the refinery, Texaco-Trinidad telephoned John Abhiram's Taxi Service and requested a taxi. This taxi company, duly licensed by the Trinidad government, was one of two local companies used by Texaco-Trinidad for

such purposes. Rambally Abhiram, a brother of the taxi company's owner and licensed to work as a taxi driver, was sent to take the Master, Hopson, and Reynolds to Port-of-Spain.

Between Pointe-a-Pierre and Port-of-Spain, the taxi collided with a truck. As a result of the collision, the Master and Reynolds were killed, Hopson and the taxi driver were seriously injured. In July 1963 Hopson and the personal representative of Reynolds instituted separate actions against Texaco. In their respective complaints they alleged that Rambally Abhiram's negligent operation of the taxi was the proximate cause of the accident and resulting injuries and death and that Texaco was liable for his negligence since the driver was, in fact, Texaco's agent. The cases were consolidated for trial in the lower court.

At the close of all the evidence, Texaco moved for a directed verdict. Texaco's position was that the taxi driver was an independent contractor, not an agent, and Texaco was not responsible for any negligence of the taxi driver as long as it had exercised reasonable care in selecting the taxi company and there was no evidence to show that it had failed in this respect. The District Court denied the motion and held as a matter of law that Texaco was liable for any negligence on the part of the taxi driver which contributed to the accident. The court's ruling was based on three theories, any one of which the court deemed sufficient to impose liability on Texaco: (1) the taxi driver was an "agent" of Texaco within the meaning of that term as used in the Federal Employers' Liability Act (herein called FELA); (2) Texaco owned a nondelegable duty to provide reasonably safe facilities for the seamen to use in the course of their employment; and (3) the contract with the taxi company was void under 45 U. S. C. A. § 55. The cases were then submitted to the jury on the issues of the taxi driver's negligence and damages. The jury concluded, based on facts and circumstances surrounding the accident which are not material to this appeal, that

the taxi driver was negligent and awarded damages of $75,000 to the widow and dependents of Reynolds and of $45,000 to Hopson.

In this appeal, Texaco does not contest the jury's finding that the taxi driver was negligent or the amount of damages. Further, it concedes that Hopson and Reynolds were acting in the course of their employment within the terms of the Jones Act (46 U. S. C. A. 688) when the accident occurred. The thrust of its argument is that the District Court erred in holding as a matter of law that Texaco was responsible for the taxi driver's negligence on any of the three theories.

Under general maritime law a seaman could only recover against a ship or its owner for personal injuries suffered in line of service when there had been a breach of the duty to provide a seaworthy ship or to provide him with maintenance and cure. The Jones Act, under which the present suits were brought, gave to seamen or their personal representatives a cause of action against their employer based on negligence. *Cortes v. Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932). By reference, the Jones Act incorporated the standards of the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51-60, for determining the employer's liability. Under section 1 of the FELA, 45 U. S. C. A. § 51, a railroad is liable to its employees for injuries or death resulting in whole or in part from the negligence of any officers, agents, or employees of such railroad. Other sections of FELA, not material here, abrogate or modify the common law defenses of the fellow servant rule, assumption of risk, and contributory negligence.

The first theory relied on by the District Court to hold Texaco responsible for the taxi driver's negligence was that the taxi driver was an "agent" of Texaco within the meaning of section 1 of the FELA. That section does not define the term "agents." Of course, if the taxi driver was an agent under common law principles, he would be an agent for the purposes of the FELA also. However,

the court ruled as a matter of law that the taxi driver was an agent and it is clear from the record that the court's ruling was not based on common law principles, but primarily upon the decision in *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326 (1958). The court concluded that the taxi driver was an "agent" because in transporting the seamen to the U. S. Consul's office to be repatriated, he was performing an "operational activity" of Texaco.[1]

The *Sinkler* case established new concepts to be used in determining who is an "agent" under the FELA. But we do not think that decision can be interpreted to mean that every independent contractor who performs some function incident to the business of railroading or shipping is an agent of the railroad or ship. There, the plaintiff was employed by the Missouri Pacific Railroad as a cook in the private car of Missouri Pacific's general manager. Belt Railway was under contract with Missouri Pacific to perform all the switching operations in Union Station at Houston, Texas. Belt had been organized by Missouri Pacific and other common carriers for that specific purpose and had been performing all the switching operations since 1905.[2] On the day of the accident, Belt's switch-

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1. Statements by the court would seem to negate any possibility that it relied on common law principles. It stated:

> "The taxi cab which the official of Texaco-Trinidad Corporation called was not owned or controlled by the Texaco-Trinidad Corporation or the Texaco Company."

The court added:

> "The Court is of the opinion that the decision in Sinkler v. Missouri Pacific R. R. Co., 356 U. S. 326 (1958), controls the motion before this Court."

2. Based on these and subsidiary facts, the jury in the lower court had found that Belt Railway was under the control and supervision of the Missouri Pacific. The state appellate court had reversed this finding as not supported by the evidence. The Supreme Court apparently disregarded it also in reaching its conclusion. See 356 U. S. at p. 331 and footnote 2 of the dissenting opinion, 356 U. S. at p. 333. Also, in Ward v. Atlanic Coast Line R. Co., 362 U. S. 396, 397 (1960), the Court stated Belt was an independent contractor.

ing crew undertook to move the car in which Sinkler was working from one track to another. Through negligent fault of the switching crew, the car violently collided with another car and plaintiff was injured. In holding that Missouri Pacific was liable for the negligence of Belt's employees, the Court did not base its decision upon consideration and application of common law principles of agency. Instead, the Court elected to base its decision upon what it found to be the broad congressional purpose behind the legislation and the nature of the service performed by Belt's employees. The purpose was stated as follows:

> "* * * This statute, an avowed departure from the rules of the common law * * * was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. * * * The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. * * * [I]t was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. * * *" 356 U. S. at pp. 329-330.

The Court said:

> "* * * Switching is a vital operational activity of railroading consisting in the breaking up and assembly of trains and the handling of cars in interchange with other carriers. This function, in the Houston area, had been contracted by the respondent and its predecessors, and other carriers, to the Belt Railway, a carrier specially organized for that purpose." 356 U. S. at p. 327.

In considering this appeal, it is necessary that we determine the intended meaning of the Supreme Court in its use of the phrase "operational activities." The language used by the Court in that connection is most helpful:

> "In the present case the respondent [Missouri Pacific], rather than doing the *necessary* switching incident to its business in the Houston Terminal area, arranged that the Belt Railway should supply the crews and equipment to perform this operation on its behalf. But the evidence clearly establishes that the respondent's trains, when under the control of the Belt Railway's switching crews, were being handled to *further the task of the respondent's enterprise.* While engaged in switching and handling respondent's cars and trains about the terminal area, the Belt Railway employees on the job were, for purposes of the FELA, as much *a part of the respondent's total enterprise* as was the petitioner while engaged in his regular work on the respondent's car." 356 U. S. at 331. (Emphasis added.)

The Court concluded by stating at page 331:

> "* * * We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, *operational activities* of his employer, such others are 'agents' of the employer within the meaning of § 1 of FELA." 356 U. S. at 331 and 332. (Emphasis added.)

From the opinion in *Sinkler,* it is clear that plaintiff's injury was a result of a risk connected with railroading and one which FELA was designed to cover. Moreover, at the time he was injured, plaintiff was actually performing the job for which he had been employed and the injury he sustained was a direct result of the negligence of another railroad's employees who were engaged in a common endeavor without the services of which Missouri

Pacific could not have operated its trains. More recently, the Court has referred to and described the factual situation in *Sinkler* as one in which the railroad engaged an independent contractor to perform "operational activities" *required to carry out the franchise. Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396, 397 (1960). One court has stated that it is crucial in applying the *Sinkler* formula that the railroad actually be performing activities necessary to carry out the franchise. *Mazzucola v. Pennsylvania R. R. Co.*, 281 F. 2d 267 (3 Cir. 1960), footnote 4, at page 270.

Applying the guideline principles announced by the Court in *Sinkler* to the present case and giving the word "agents" an accommodating scope as we feel compelled to do, we do not think the services performed by the taxi company can be called an "operational activity" of Texaco. The nature and regularity of the taxi services rendered are completely different from the services rendered by Belt Railway in *Sinkler*. The taxi company was one of two local companies which Texaco-Trinidad occasionally used for performing business errands outside the area of the refinery. While the evidence revealed that the taxi company made on the average of two or three trips a week to various places on the Island, most of these trips were for the purpose of taking documents to the U. S. Consul's office or other places in which case the taxi driver himself delivered the documents. Obviously, few trips would be made for the purpose of repatriating seamen. The service rendered was not, in itself, a part of Texaco's business of transporting petroleum products to various ports or of operating the tanker Wisconsin. The taxi driver was not performing the same type of work as the seamen and his work had no direct connection with the shipping business. In short, the tax company was not a part of Texaco's enterprise; the service performed by it was simply a collateral activity which had nothing to do with the actual operation of a ship.

Two subsequent decisions hereinafter mentioned in which the *Sinkler* doctrine was applied may appear to sup-

port a conclusion contrary to ours as stated above. *Carney v. Pittsburgh & Lake Erie R. R. Co.*, 316 F. 2d 277 (3 Cir. 1963), one judge dissenting, cert. denied 375 U. S. 814; *Leek v. Baltimore & Ohio R. R. Co.*, 200 F. Supp. 368 (N. D. W. Va. 1962). Admittedly, those cases held certain services performed by independent contractors to be "operational activities" of railroading that tend to extend the *Sinkler* doctrine. But even in those cases, the frequency and nature of the services rendered differ from the case at bar. In *Leek* the cab company was hired by the railroad to shuttle train crews between the place where the crews signed in and reported for work and the place where the work was performed. The taxicab would pick up crews ready to begin work and take them to the place of operations. There, it would pick up the crews that were being relieved and transport them back to the check-out point. This shuttling service was provided at the beginning of every shift during each day and had continued over a period of several years. The court, in holding that the cab company was performing an "operational activity," stated at page 371:

> "* * * This is the day after day, week after week, contract carriage of groups of employees, on company time, between fixed points. It is an integral and continuing part of the railroad's total operations. * * *"

In *Carney*, 316 F. 2d 277, the railroad had transferred several of its employees to a town in Ohio for the purpose of constructing a special project. It arranged for Carney and his fellow workers to stay at the Pittsburgh & Lake Erie Railroad Y. M. C. A. Carney and the other workers slept at the Y. M. C. A. during the work week, ate two meals a day at its restaurant, and had their lunches packed by Y. M. C. A. employees. This routine had been followed for several months prior to the accident in which Carney was injured when he fell from a negligently maintained bed in the Y. M. C. A. The court concluded that the Y. M. C. A.

was performing operational activities for the railroad. It stated at page 281:

> "What we have here is that the lodging of Carney at the railroad Y. M. C. A. was an integral part of the Pittsburgh & Lake Erie's particular and important project in the vicinity. By that means the railroad made sure that Corney was on location and readily available during the period of the Campbell undertaking. The railroad handled Carney's board and lodging through the Y. M. C. A. '* * * to further the task of [its] enterprise.' And it was just as much a part of that enterprise as when Carney was actually stringing cable, for it put him in Campbell and kept him there to do that phase of the work. * * * In this instance it was solely Pittsburgh & Lake Erie construction, alterations or repairs which were involved and for which his employer wanted Carney to be and remain at the scene. * * *"

Obviously, the railroad benefited from Carney's presence and the service rendered by the Y. M. C. A. was a continuing part of the railroad's over-all operation at the project.[3]

In two cases factually similar to the case at bar but decided before *Sinkler*, the courts held that a shipowner was not liable to seamen injured by the negligence of an independent contractor hired by their employer in the absence of a showing that the shipowners had negligently selected an improper or incompetent contractor. *McCall v. Overseas Tankship Corp.*, 222 F. 2d 441 (2 Cir. 1955); *Premeaux v. Socony-Vacuum Oil Co.*, 187 S. W. 2d 690

3. Our attention has been directed to a California case, Mangrum v. Union Pacific Railroad Company, 41 Cal. Rptr. 536 (December 1964) in which a physician who was called by the railroad to attend a sick dining car employee was held to be an agent of the railroad under the expanded doctrine of Sinkler. But, insofar as that case held the service of the physician to be an "occupational activity" of the railroad and that the physician was an agent of the railroad, we do not find it even slightly persuasive.

(Tex. Civ. App. 1945). In *McCall* the contractor had been hired by the employer to transport, by plane, the crew of a tanker from the Far East to New York. While making the trip the contractor's plane crashed and McCall was killed. The court stated at page 444:

> "Even if it be assumed arguendo that McCall continued in the employ of Overseas during his flight home, its contractual duty to 'arrange transportation' did not make it an insurer of his safety en route. Its duty was to exercise ordinary and reasonable care in selecting the carrier. There is no suggestion that it failed to do so."

Judge L. Hand, in a concurring opinion, agreed that Overseas was not liable. He stated:

> "Since we are all agreed that the airplane company was an independent contractor, whose negligence is not to be imputed to the defendant, it is not necessary to decide whether McCall was still in the employment of the defendant * * *." 222 F. 2d at 445.

In the Socony-Vacuum case, plaintiff's decedent was employed as a seaman aboard Socony's ship. While the ship was on a voyage in the Caribbean Sea, he became ill and had to be repatriated. Socony arranged transportation for him aboard another vessel returning to the United States. Some little time after he had returned to the States, he died from his illness. His personal representative brought an action under the Jones Act against Socony, alleging that Socony was liable for its failure to provide maintenance and cure. Part of the claim was based on a specific allegation that the deceased had not received proper medical treatment on board the vessel which Socony had hired to transport him to the United States. In regard to this part of the claim, the court stated:

> "The Jones Act, by referring to and adopting relevant portions of the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq., which makes the em-

ployer liable for the negligence of his officers, agents, and employees, may have enlarged the employer's liability in some instances * * *, but not where an independent agency has been employed. An independent contractor is not an officer, agent or employee within the meaning of the Federal Employers' Liability Act, at least, where the employer's duty is not absolute. * * *" 287 S. W. 2d at 698.

While *McCall* and *Premeaux* must be read in light of the later *Sinkler* decision, for reasons hereinbefore assigned, we do not think that *Sinkler* would compel a different result in those two cases. We are not persuaded that the repatriation of a seaman is an "operational activity" within the meaning of the phrase as used in *Sinkler*. Consequently, we hold that the District Court erred in deciding as a matter of law that the taxi driver was an agent of Texaco and in so instructing the jury.

The second point made by the District Court was that an employer "owed a nondelegable duty to provide reasonably safe facilities that his employee must use in the course of his employment." The court was announcing orally from the bench its ruling on the defendant's motion for a directed verdict, but made no explanation of its reasoning and cited no authority in support of this stated conclusion. No written opinion was filed. The court had earlier stated that at the time of the accident the two seamen riding in the taxi were in the employment of Texaco and "they were seamen on the ship, the TEXACO WISCONSIN." The plaintiffs and defendant, in main briefs and argument, seem to construe the court's pronouncement as a reference to the employer's duty to provide the employees with a safe place in which to work and to furnish safe equipment, appliances, instrumentalities, and "facilities" to be used in the performance of their work.

We start with the basic premise that Texaco had a duty to exercise reasonable care to provide a safe place for the

seamen to work and to provide them with reasonably safe "facilities" (to adopt the catch-all word used by the court below) for use by the employees in the performance of their work. Possibly the District Court was relying on Mr. Justice Clark's concurring opinion of less than four lines in the *Sinkler* case:

> "* * * for purposes of the FELA, the Belt Railway was performing a nondelegable duty of respondent's at the time of petitioner's injury." 356 U. S. at p. 332.

But the duty under the FELA to furnish a safe place to work is not *absolute* and thus an employer is not an insurer of his employee's safety;[4] that duty is to exercise *reasonable care* to provide employees with a safe place in which to work.[5] The employer is not an insurer of any of the tools or instrumentalities with which the employee is required to work[6] but is liable for any defects or insufficiencies therein if attributable to the employer's negligence.[7] When the cause of action is based on the Jones Act, negligence concepts are applicable and the shipowner is required only to exercise reasonable care to provide employees a safe place to work and safe appliances;[8] that

4. Wilkerson v. McCarthy, 336 U. S. 53 (1949); Chesapeake & Ohio Ry. Co. v. Thomas, 198 F. 2d 783 (4 Cir. 1952); Atlantic Coast Line R. Co. v. Craven, 185 F. 2d 176 (4 Cir. 1950); Terminal R. Ass'n of St. Louis v. Howell, 165 F. 2d 135 (8 Cir. 1948).

5. Wilkerson v. McCarthy, 336 U. S. 53 (1949); Ellis v. Union Pacific R. R. Co., 329 U. S. 649 (1947); Bailey v. Central Vermont Ry., Inc., 319 U. S. 350 (1943).

6. Terminal R. Ass'n of St. Louis v. Howell, 165 F. 2d 135 (8 Cir. 1948).

7. American Pacific Whaling Co. v. Kristensen, 93 F. 2d 17 (9 Cir. 1937); Brittingham v. Ore S. S. Corp., 62 F. 2d 616 (4 Cir. 1933).

8. Michalic v. Cleveland Tankers, Inc., 364 U. S. 325 (1960); Wilkerson v. McCarthy, 336 U. S. 53 (1949); Bailey v. Central Vermont Ry., Inc., 319 U. S. 350 (1943); Southern Ry. Co. v. Fox, 339 F. 2d 560 (5 Cir. 1965); West v. United States, 256 F. 2d 671 (3 Cir. 1958); 2 Norris, The Law of Seamen § 688 (2 ed. 1962).

duty is not *absolute* as held and recognized to be in causes of action based solely on unseaworthiness. *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (1960).

Here, Texaco was under the legal duty to repatriate these ill seamen in the discharge of its obligation to provide proper maintenance and cure; it was undoubtedly also a contractual duty by virtue of the ship's articles and company-union contracts. The duty to repatriate was recognized by Texaco; the seamen were to be returned as soon as possible to America; they and the ship were in a distant part of the world. The plan, unquestionably reasonable under the circumstances, was to provide the seamen's transportation for a distance of thirty-eight miles by motor vehicle and then by plane to their destination. The Supreme Court has stated:

> "* * * Congress [by enacting the FELA and the Jones Act] did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. * * *" *Cortes v. Baltimore Insular Line, Inc.*, 287 U. S. 367, 377-378 (1932).

This court will take judicial notice of the fact that it is virtually impossible for a shipowner to carry its own shore-side means of transportation from one port to another or for it to own, operate, or control shore-side transportation facilities in every port and every part of the world. It would be unreasonable to require or expect a shipowner to do so. The *performance* by the shipowner of the duty and obligation to repatriate seamen, whose vessel is then located in a far distant port must, of necessity, be delegated to independent carriers. The rule of reason and logic requires no more than that the selection of the carrier shall not be negligently made.

These seamen were still in the "course of their employment" when the accident occurred. Whether the taxicab in which they were riding be considered as a "place" in which they were working or a "facility" or instrumentality provided for their use, the question is—did Texaco exercise reasonable care in selecting and providing the mode and means of transportation. The evidence disclosed that the taxi company was duly licensed and authorized to operate taxicabs by the government of Trinidad; Texaco's choice was limited as there were only two taxi companies so licensed and operating on the island; both were used from time to time by Texaco-Trinidad. There is no evidence that the cabs of one of the licensed companies were any better or safer than those of the other; there is no evidence to even suggest that an investigation by Texaco would have disclosed that the selected taxi company employed drivers who were notoriously careless, reckless, negligent, unqualified, incompetent, or accident prone. But even if there were such evidence to support a finding that Texaco had acted negligently and had failed to use reasonable care in the circumstances, the question presented would be for the jury and not for the court.

The court below next voiced the conclusion that the transportation contract between Texaco and the taxi company was "void" under 45 U. S. C. A. § 55, presumably because of the court's view that Texaco's purpose was to exempt itself from liability by contracting with another to perform a "nondelegable duty." The statute, which the court obviously deemed pertinent, reads in part as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

As we have stated, there was no legal duty on Texaco to provide its wholly owned, operated, and controlled trans-

portation facilities on Trinidad. We are uninformed as to any cases upon which the court may have relied as supporting its interpretation and application of the statute. We have found two cases which, in the over-all view of the case taken by the lower court, might have been accepted by it as reliable authority.[9] But those cases are clearly distinguishable from the case at bar because of factual differences. In both, the contractors were performing operational duties for the railroad, duties which would, in fact, warrant the conclusion that the contractors were "agents" of the railroads under the *Sinkler* doctrine. We find the statute inapplicable here.

We are of the opinion that the District Court erred in denying Texaco's motion for a directed verdict.

Reversed.

SOBELOFF, *Circuit Judge*, dissenting:

In overturning these judgments in favor of one injured seaman and the surviving dependents of another, the court, I submit, takes too narrow a view of the Supreme Court's holding in *Sinkler v. Missouri Pacific R. R. Co.*, 356 U. S. 326 (1958). That case emphasizes that an "accommodating scope" must be given to the word "agents" in order to effectuate the purposes of the Federal Employers Liability Act.[1]

We are dealing here with no simple case of "independent contractor." As *Sinkler* teaches, a finding that the cab owner was an independent contractor does not end the inquiry. He may still be an agent within the FELA if he is an integral part of the employer's enterprise and is per-

9. Erie R. Co. v. Margue, 23 F. 2d 664 (6 Cir. 1928); Eddings v. Collins Pine Co., 140 F. Supp. 622 (N. D. Calif. 1956).

1. The standards for determining an employer's liability under the FELA have been incorporated into the Jones Act. 46 U. S. C. A. § 688 (1958).

forming an "operational activity," particularly a statutory obligation due an employee. We must consider the nature of the employer's business, the relationship of the so-called independent contractor to the employer, and the character of the duty owed by the employer to the two seamen which was being carried out by the driver at the time of the collision.

What may have seemed at common law to be a self-evident proposition—that an employer is immunized from liability to his employee for an independent contractor's negligence—no longer necessarily prevails since the enactment of the FELA.[2] To prevent "erosion" of this law by "narrow and niggardly construction," *Rogers v. Missouri Pacific R. R. Co.*, 352 U. S. 500, 507-09 (1956), we are admonished by *Sinkler* to take a broad view of the "operational activities" test.[3] We must strive to envisage the entire pattern of activities performed for Texaco by the two "taxicab" owners, John Abhiram and Willie Chattergoon, rather than isolating and focusing on one single incident—the trip on which the seamen were injured—as though it were unrelated to other events and to Texaco's total enterprise. The carriage in question was not a casual

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2. At common law the doctrine of *respondeat superior* did not extend to cases where an independent contractor's negligence caused an employee's injury. This was the rule applied by the lower court in *Sinkler* and rejected by the Supreme Court as inappropriate in FELA cases where the independent contractor was engaged in an "operational activity" on behalf of the employer.

Even at common law, however, as Justice Brennan points out in *Sinkler*, a number of courts recognized that merely labeling a relationship as "independent contractor" did not shield an employer from liability when the negligence arose in the performance of certain phases of the carrier's activities.

3. "[J]ustice demands that one who gives his labor to the furtherance of the enterprise should be assured that *all combining their exertions with him in the common pursuit* will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages." 356 U. S. at 330. (Emphasis added.)

transaction. It was part of an established system in the conduct of the defendant's business.

Texaco, Inc., through a wholly owned subsidiary, maintains an oil refinery at Point-a-Pierre on the island of Trinidad. Texaco's vessels regularly visit there, take on cargoes from the refinery and embark for various ports. On April 17, 1963, the SS. TEXACO WISCONSIN, one of the defendant's tankers, was loading a cargo of oil, intending to proceed via the Panama Canal to San Diego, California, when two of the crew, Hopson and Reynolds, became ill. The master concluded that they should not continue on the voyage as they required more expeditious treatment. He decided to arrange for their discharge and repatriation. For this purpose it was necessary for the master and the ill crewmen to present themselves to the American consul at Port-of-Spain, 38 miles from Point-a-Pierre; for under the law only the consul is authorized to discharge an American seaman in a foreign port.

Texaco maintained a fleet of automobiles for use chiefly within the confines of the refinery; but for the carriage of persons and documents beyond the refinery enclosure it had a standing arrangement with two cab owners, John Abhiram and Willie Chattergoon. Each handled about half of this Texaco business, which consisted of frequent trips to Port-of-Spain, the capital and principal city of Trinidad.[4] They also made trips to Texaco's infirmary, located about five miles from the refinery. Texaco availed itself of this service exclusively and regularly—"quite a lot" according to Texaco's shipping agent. One of the taxicab owners testified that he made two or three trips a week carrying documents or personnel to Port-of-Spain for Texaco.

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4. Port-of-Spain is the capital, largest city and principal port in Trinidad. The embassies of six nations—France, Germany, Netherlands, Venezuela, Lebanon and the United States—are located there, as well as High Commissions of four others—including Britain, Canada and India. See 1964-65 *Statesman's Yearbook* (S. H. Steinberg ed.) p. 538.

On the occasion in question one of these, Abhiram, was selected by the husbanding agent of the tanker to take the master and the ill crewmen to the consul.[5] On the way, the cab collided with a bus; Reynolds was killed and Hopson seriously injured. The question of the cab driver's negligence was contested in the District Court but, the jury having found that his negligence was the cause of the collision, Texaco does not dispute the point in this court.

It is conceded that the two crewmen were still in the ship's service at the time of the collision. It is not denied that 46 U. S. C. A. § 682 strictly requires any discharge of a crewman in a foreign port to be made by a consular officer. The proposition the appellants advance, and which the court accepts, is that the ride on which the sick crewmen were being taken, in the company of the master, for the purpose of having them discharged by the consul and ultimately repatriated, was "simply a collateral activity," not an operational activity, and had "nothing to do with the actual operation of a ship," or as alternatively stated, was "not a part of Texaco's enterprise." To these restrictive characterizations I cannot consent.

It was indeed, as the majority opinion points out, not a *daily* task to transport sick seamen to the consul; but how significant is this? That on this particular occasion the passengers were a master and his ill seamen, while at other times the arrangement with Abhiram and Chattergoon was used to carry persons who were not sick and not expected to be discharged from service, is not a meaningful distinction. The answer turns on the nature of the habitual journeys of Abhiram and Chattergoon on behalf of Texaco, not on the frequency with which seamen happen to fall ill and are taken ashore, whether for treatment nearby, or for discharge and repatriation with a view to treatment arranged for them elsewhere.

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5. Ramillay Abhiram was the actual operator of his brother John's vehicle. This circumstance does not affect the legal issue.

Abhiram and Chattergoon served Texaco regularly as the overall needs of the company required. In amplification of his testimony that Abhiram and Chattergoon were used "quite a lot," Carte further commented that "this car [Abhiram's] is used by us from day to day * * *"; and noted that the various ships' captains "used those cars all the time." In particular, when a Texaco ship was to put in at a port requiring prior consular certification, these drivers were used to take the necessary documents to the appropriate consulate in Port-of-Spain. The same arrangement was utilized whenever crewmen on Texaco's ships became ill and required treatment in Texaco's infirmary.[6]

Texaco's ships could not sail without consular certifications, and Texaco was required to provide medical care for its ill seaman. Thus these activities were clearly an essential part of its total shipping enterprise, and bringing the master and the sick seamen to the consul that morning falls within the term "operational activity." This term is not limited to the manipulation of the ship's gear. It includes the recruitment of the crew and furnishing of maintenance and cure to seamen when ill. It is no undue extension of the term to include the transporting of seamen to the consulate preparatory to their discharge for repatriation. Caring for these ill seamen was no less than an opera-

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6. Carte acknowledged on deposition that if a crew member on a Texaco ship wanted or needed medical attention it was customary for the captain to notify the shipping agent to arrange for treatment at the Texaco infirmary, located outside the refinery area. In fact, Hopson himself had been taken to this infirmary by cab just two days before the accident.

The majority's analysis emphasizes the non-repetitiveness of travel to the consular office for the purpose of discharge and repatriation for treatment. In this view the more regular carriage of ill seamen directly to the infirmary would apparently come closer to satisfying the *Sinkler* test of operational activity. To my mind it draws an artificial distinction to exclude from the broad coverage of the *Sinkler* rule the carriage of seamen to the consul under the same arrangement by the same drivers in the same vehicles, for the same ultimate objective.

tional activity because it was not to be performed aboard the vessel.[7]

The fortuitous circumstance that the shipowner maintained its own vehicles for some purposes and had steady arrangements with two taxicab owners to run various errands between the pier and the consul's office, which is located at a somewhat greater distance, instead of using its own vehicles for all purposes, should not alter the responsibility of the ship. When a seaman becomes ill he is particularly in the master's care. In fact, the very trip that resulted in tragedy was an essential preliminary step in the performance of the inescapable duty of maintenance and cure.[8]

There is no valid ground on which to distinguish the instant case from *Carney v. Pittsburgh & Lake Erie R. R. Co.*, 316 F. 2d 277 (3d Cir. 1963). There the defendant railroad had a project near Youngstown, Ohio, on which the plaintiff was working. Rather than transfer the worker to Youngstown—where he could pay his own expenses—the railroad agreed to pay his room and board at the local YMCA. This arrangement with the railroad accounted for no more than 3% of the use of the Y's facilities. The employee was injured when he fell from a negligently maintained bed in the Y, and the railroad was held responsible on the theory that the Y was its agent. The court said:

> "[I]n supplying those services to plaintiff with the railroad, [the Y] was performing 'operational activities' of plaintiff's employer * * *. He was there under

7. The District Court stated that the case was controlled by *Sinkler*, and added that whether a theory of agency or nondelegable duty was employed, the same result would be reached. I agree that liability exists whether "agency and nondelegability" is viewed as an independent theory of liability or as a necessary emanation from the *Sinkler* rule.

8. This is not simply a case involving the duty to provide the seamen with a safe place to work. Their illness placed an additional duty on the shipowner to provide them with medical care, and Abhiram was actually assisting in this aspect of the ship's business.

> the specific agreement with his employer that he would retain his out of town status and that the railroad would pay for his living expenses." 316 F. 2d at 279.

It is noteworthy that Carney could sleep in the Y or not, as he desired, while Hopson and Reynolds had no voice in the selection of the means used to effectuate their discharge and repatriation.

Nor can Texaco be absolved on the ground that it did not stand to "benefit" from taking Hopson and Reynolds to the consul, for it cannot possibly be maintained that the performance of its statutory duty to the men was not beneficial to it. Surely no test of operational activity is acceptable which inquires only whether the employer is directly benefited and rules out whatever benefits the employees. It is enough that the employer benefits from the employees' services as members of the crew. An employer will not be permitted to say that only what brings him direct profit is covered by the law, disregarding his concomitant obligation to the employees. The stark simplicity of the proposed test is insensitive to the underlying policy of the FELA and the Jones Act.[9]

Within our own circuit, the transportation of workmen to and from their place of employment was recently held to be an "operational activity." *Leek v. Baltimore & Ohio R. R. Co.*, 200 F. Supp. 368, 370 (N. D. W. Va. 1962). The case was not appealed. There a railroad employee was permitted to recover under FELA for injuries sustained through the negligent operation of a taxicab provided by the railroad to take employees home at the end of the day. Similarly, taking the ill seamen to the consul for discharge

9. See Mangrum v. Union Pacific R. R. Co., 41 Cal. Rptr. 536, — P. 2d — (Dist. Ct. App. 1964) (alternative holding), which points out that since a railroad is required to take care of its employees who are taken sick on duty—just as Texaco was required by law to care of these ill seamen—a doctor who provides such medical care benefits the employer and may be an FELA "agent," though otherwise an independent contractor. See also O'Donnel v. Pennsylvania R. R. Co., 122 F. Supp. 899 (S. D. N. Y. 1954).

and repatriation is an operational activity without which a ship cannot function as the statute requires. There is no legally significant difference between the transportation of an employee by an employer when he is released for the day and the transportation of crewmen preparatory to their discharge. Indeed, if there were any distinction, the present case would seem the stronger of the two.

A most exhausive analysis of the *Sinkler* doctrine is found in *Mangrum v. Union Pacific R. R. Co.*, 41 Cal. Rptr. 536, 543-48, P. 2d , (Dist. Ct. App. 1964). There a railroad was held liable for the negligence of a doctor retained by the employer to treat an ill employee. Although the doctor was a private practitioner on the staff of four different hospitals, received no salary from, and was subject to no control by, the railroad,[10] it was held:

> "The doctor was engaged in an operational activity of the railroad, one necessary to carry out its franchise, * * * *for a railroad cannot operate properly without a full healthy crew.*" *Id.* at 548, P. 2d at . (Emphasis added.)

And the railroad was required to answer for the doctor's conduct as an "agent." Similarly, the S. S. TEXACO WISCONSIN could not function without a healthy crew. The trip to Port-of-Spain to arrange for discharge of the ill seamen with a view to medical care was so intimately related to this function as to make it an operational activity and to make Abhiram an FELA agent.

The majority opinion prefers the reasoning of two pre-*Sinkler* cases to that of post-*Sinkler* decisions applying the "operational activities" standard. Neither of the two cases relied on by the court[11] discussed the "operational activi-

10. Under the *Sinkler* analysis, of course, the autonomy of the third party and his "freedom from detailed supervsion of its operations," are irrelevant where operational activities of the employer are being performed. See 356 U. S. at 331.

11. McCall v. Overseas Tankship Corp., 222 F. 2d 441 (2d Cir. 1955); Premeaux v. Socony-Vacuum Oil Co., 187 S. W. 2d 690 (Tex. Civ. App. 1945).

ties" concept under the FELA or under the common law. Moreover, *McCall* is distinguishable, for the crewmen had already been discharged.[12]

My brethren take "judicial notice" that it is "virtually impossible for a shipowner to carry its own shore-side means of transportation from one port to another or for it to own, operate, or control shore-side transportation facilities in every port and every part of the world." Preliminarily, it is to be noted that the defendant did have vehicular facilities at Point-a-Pierre, where it maintained a large refinery, shipping office, pier and other installations, and made use of its customary arrangement with Abhiram on the date of the collision.

But more to the point, it is not unfair to suggest that a court should take judicial notice that the sick seamen were in a far less favorable position than their employer to arrange independent means of transportation to the consulate. Hopson and Reynolds were not on a mission of their own and the choice of means was not theirs. Their dependence upon the master was not a whit less in the car than at sea.

The proper approach in Jones Act cases was expounded over thirty years ago by Justice Cardozo for a unanimous Court:

> "The Act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings.' *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 375 (1932).

This is the same philosophy taught by *Sinkler*. The language from *Cortes* which my brethren quote is, it seems to me, misapplied. The Court's opinion did observe that "the conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties." The

12. Judge Learned Hand's dictum in a one-sentence concurring opinion does not foreclose inquiry under the legal standards subsequently declared by the Supreme Court.

majority opinion seems to read Justice Cardozo's words as expressing a limitation of liability when a seaman is injured on land rather than aboard ship; but the entire context of the *Cortes* quotation makes clear that it was meant to enlarge, not contract, the protection afforded to seamen, for immediately thereafter the Court added, significantly, that "[o]ut of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection."

This is not to say that the ship became an insurer of the seaman's safety on the journey to the consul's office. If injury had befallen the seamen on the way, without negligence on the part of the ship's agent, the ship would not be liable under the Jones Act. Nor is a carrier liable for negligence committed by its independent contractor in the performance of acts that do not constitute an operational activity. But it ignores the essence of the matter to treat this undertaking in the execution of a statutory duty to employees like the simple case where a defendant has accommodatingly called a taxicab for one wishing to go somewhere on his own business.[13]

It is more consonant with justice and the spirit of the Jones Act for the shipowner to be held to its statutory obligation in the present action and then for it to bring suit as subrogee against Abhiram in Trinidad where the shipowner does business regularly, than to remit the plaintiffs to their remedy against Abhiram in distant Trinidad.

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13. It is not necessary to pass on the additional ground for decision mentioned by Judge Butzner, based on section 55 of the FELA, which provides that:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this chapter, shall to that extent be void * * *." 45 U. S. C. A. § 55 (1958).

Here, we cannot say that we have a devious device calculated to avoid tort liability, for it does not appear that it was so motivated. But neither did the Supreme Court in *Sinkler* seek such motivation in the arrangement between the railroad and the Belt line. Section 55 does, however, evidence the firm congressional design of affording broad protection to the employees covered by the statute.

In summary, Texaco having arranged with Abhiram and Chattergoon to serve its transportation needs between Point-a-Pierre and Port-of-Spain, rather than performing this work with its own vehicles, this carriage was an operational activity no less than the switching of cars in *Sinkler*, the transportation by taxicab in *Leek*, the use of the YMCA's beds in *Carney* and the doctor's services in *Mangrum*.

I would affirm the judgments of the District Court.

APPENDIX D

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9668.

FILED
SEP. 15, 1965
MAURICE S. DEAN
Clerk

GEORGE HOPSON,

Appellee,

v.

TEXACO, INC.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, with directions to set aside the verdict and to have further

proceedings not inconsistent with the opinion of the Court filed herein.

September 13, 1965.

HERBERT S. BOREMAN,
United States Circuit Judge.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9669.

FILED
SEP. 15, 1965
MAURICE S. DEAN
Clerk

REBECCA B. REYNOLDS, ADMINISTRATRIX OF THE ESTATE OF FREDERICK CLEMENT REYNOLDS, DECEASED,
Appellee,

v.

TEXACO, INC.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, with directions to set aside the verdict and to have

further proceedings not inconsistent with the opinion of the Court filed herein.

September 13, 1965.

HERBERT S. BOREMAN,
United States Circuit Judge.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 818

GEORGE HOPSON and REBECCA B. REYNOLDS, Administratrix of the Estate of FREDERICK CLEMENT REYNOLDS, Deceased,

Petitioners,

vs.

TEXACO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Does A Common Carrier, An Independent Contractor Licensed By And Operated In A Foreign Country, But Not Owned, Operated Or Controlled By An American Shipowner, Become An Agent Of That Shipowner [As A Matter Of Law Under The Jones Act] When Employed To Transport Crew Members Undergoing Repatriation From That Foreign Country?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Texaco, Inc., respectfully prays that petitioners' application for a Writ of Certiorari to review the final judgments of the United States Court of Appeals for the Fourth Circuit, entered on September 15, 1965, be denied.

The Opinions of the Courts Below, the Jurisdictional Requisites and the Statutes Involved are correctly and adequately set forth in the Petition.

Respondent disagrees however with the Question Presented as it is stated in the Petition. The issue considered in both the District and Circuit Courts is:

QUESTION PRESENTED

Does A Common Carrier, An Independent Contractor Licensed By And Operated In A Foreign Country, But Not Owned, Operated Or Controlled By An American Shipowner, Become An Agent Of That Shipowner [As A Matter Of Law Under The Jones Act] When Employed To Transport Crew Members Undergoing Repatriation From That Foreign Country?

STATEMENT OF THE CASE

The factual evidence and findings on which both lower Courts' decisions were made, were not in dispute in the District Court nor contested in the Court of Appeals. They are not expressed with complete accuracy in the Petition and thus a Statement of the Case is necessary.

The S/S TEXACO WISCONSIN, owned and operated by Texaco, Inc., and on which George Hopson and Frederick Reynolds were employed, was loading petroleum in a foreign country (Trinidad) when those crew-members were taken sick and had to be repatriated. The ship master requested the local ship's agent to arrange transportation to the American Consulate in Port-of-Spain, (38 miles distant) for the actual discharge of these seamen before that official as required by American statute.

The ship's agent (Texaco-Trinidad, Inc.) also owns the very large refinery at which the ship was loading and within the bounds (fence) of which there is a large infirmary where its own employees as well as crew-members of visiting ships receive medical treatment and hospitalization. This infirmary is within a mile of the boat or launch landing where ships crews come ashore from the vessels which actually load at mooring dolphins located off-shore.

For transportation to the infirmary or anywhere within the bounds (fence) of the refinery, Texaco-Trindad furnishes vehicles of its own, but for any transportation beyond its boundary or fence, and on the Trinidad public highways, the ship agent always employs one of two public taxi services operated from San Fernando, the nearest town. (District Court Ruling, Appendix B, Page-4a, Petition; Court of Appeals Opinion, Appendix C, Page-16a, Petition; Appendix hereto, *Infra,* Page 1a).

There was no evidence that a taxi had been used two days earlier to transport Hopson and Reynolds from the boat landing to the infirmary—all within the refinery fence.

Neither the shipowner nor its agent owned, operated or controlled the taxi (Abhiram's Taxi Service) which was employed to transport Hopson, Reynolds and the ship-master to the American Consulate. (Trial Judge's Ruling, Page -4a, Appendix B to the Petition).

There was no "standing arrangement" with the taxi company for any transportation, and there was no evidence that the taxi company was used to "shuttle" seamen to the infirmary or elsewhere. (District Court Ruling Appendix B, Page-4a, Petition; Court of Appeals Opinion, Appendix C, Page-16a, Petition; Appendix hereto, *Infra,* Page 1a-4a).

While en route to the Consulate, the cab was involved in a collision in which the ship-master and crew-member

Reynolds were killed and crew-member Hopson and the cab driver were seriously injured.

Upon trial of the Jones Act suits filed by Hopson and by Reynolds' Estate, the shipowner contended that its sole duty was ordinary or reasonable care in the selection of the taxi, an independent contractor whose negligence, if any, could not be imputed to Texaco under any theory of law. The District Court found no dispute in the evidence, held that the shipowner did not own, operate or control the taxi, declined to permit the jury to consider whether the shipowner had used reasonable care in selecting the taxi and ruled as a matter of law that the taxi was the shipowner's agent. Therefore the sole and narrow issue submitted to the jury was whether or not the cab driver had been guilty of any negligence which contributed in any degree (even the slightest) to the fatal accident.

Upon appeal from adverse jury verdicts and judgments rendered on that narrow issue, the Court of Appeals for the Fourth Circuit, (Judges Boreman and Bryan for the majority and Judge Sobeloff dissenting) reversed the District Court's ruling and held that in the absence of any conflicting evidence, the cab driver was an independent contractor whose negligence could not be imputed to the shipowner.

REASONS WHY A WRIT SHOULD BE DENIED

I. The Petition Seeks A Re-Determination Of Fact.

The first point on which petitioners rely for allowance of a writ, (Petition, Page-5) seeks to bring the factual findings of both the District and Circuit Courts within the scope of *Sinkler v Missouri Pacific* R.R. Co., 356 U.S. 326,

78 S. Ct. 758, 2 L.Ed. 2d 799 (1958). Those factual determinations were undisputed in the Trial Court and uncontested in the Court of Appeals. Thus this Court will be required to review the evidence, to reverse both the Trial and Appellate Courts' determinations of fact and to find on uncontested evidence, (1) that the taxicab company was "regularly employed" by the shipowner [Petition, Page-3], (2) that the shipowner "had a standing arrangement with the cab company for the transportation of persons beyond the refinery enclosure, pursuant to which the cabs were used on a daily basis," [Petition, Page-3], (3) that the shipowner used the taxi service "to shuttle" seamen to an infirmary or elsewhere about Trinidad [Petition, Page-5], and (4) that the shipowner "controlled" the taxi service. Unless such a re-determination of fact is accomplished, petitioners cannot come within *Sinkler's* scope.

The fact that these are Jones Act cases is immaterial to this Court's reticence to review and reverse undisputed factual conclusions.

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on *disputed* questions of fact and in drawing inferences from proven facts has been respected." *Wilkerson* v *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) at 3436 U.S. 70-71.

As the evidence was undisputed and the factual conclusions have heretofore been uncontested, the petition, which requires a factual review and reversal, should be denied.

II. There Is No Conflict With Any Prior Decision Of This Court.

Petitioners' contention that the Fourth Circuit's decision is in direct conflict with *Sinkler v Missouri Pacific R.R. Co.*, 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958) is entirely without merit.

In *Sinkler* (1958) this Court ruled that an apparent independent contractor, organized by a domestic railroad to perform switching of that railroad's trains, fifty-percent owned by that railroad and subject to the control and supervision by that railroad in performing the details of its work, and which had been conducting a vital part (switching) of the railroad's regular and essential operational activities (the assembly and break-up of trains) on a daily basis since 1905, became an "agent" of the railroad within the scope of 45 U.S.C. §51, The Federal Employer's Liability Act. Here, however, we are concerned with an irregular and isolated act of repatriation of American seamen from a foreign country.

In *Sinkler* this Court created a doctrine of operational activities and expressly pointed out, (Footnote #2) that the Trial Court had submitted the issue of "control" over an independent contractor to the jury which had found against the railroad. Thus the Trial Court in *Sinkler* reached an exactly opposite finding of fact than the Trial Court and the Court of Appeals reached in petitioners' cases.

In *Ward v Atlantic Coast Line R. Co.*, 362 U.S. 396, 80 S. Ct. 789, 4 L. Ed. 2d 820, (1960) this Court described *Sinkler* as being a situation in which the operational activities were "required" to carry out the carrier's franchise. In *Mazzucola v Pennsylvania R.R. Co.*, 281 F. 2d 267, 91

A.L.R.2d 518 (3rd Cir.-1960) footnote 4, Page 270, the Third Circuit indicates that the activities must be "crucial" to the franchise.

Thus petitioners seek certiorari not only to re-determine the facts but to rule that the operation of shore-side transportation in a foreign country is a crucial activity necessary and essential to the operation of an ocean-going ship.

Obviously a shipowner cannot carry his own shore-side transportation from one port to another, nor can he own, operate or control shore-side transportation facilities in every port and country in the world. That type of activity simply is not "required" nor "crucial" to the shipowner's franchise.

On the other hand, domestic railroads, (as in *Sinkler*, as in *Leek v Balt. & Ohio R.R.*, 200 F. Supp. 368, [N.D., W. Va. 1962] and as in *Garney v Pittsburgh & Lake Erie R. Co.*, 316 F. 2d 277, cert. den. 375 U.S. 814, 84 S. Ct. 45, 11 L. Ed. 2d 49 [3rd Cir. 1963] both discussed hereinafter), can and do own, operate or control "independent contractors" which perform daily, crucial, operational activities that are essential to the maintenance of the franchise.

Therefore *Sinkler, Carney* and *Leek* are neither relevant nor controlling and there is no conflict with any prior decision of this Court.

III. There Is No Conflict With Any Other Circuit.

The contention under Point II (Page 10, Petition) that the Fourth Circuit's decision is in conflict with *Carney v Pittsburgh & Lake Erie R.R.*, 316 F. 2d 277, cert. den. 375 U.S. 814, 84 S. Ct. 45, 11 L. Ed. 2d 49 (3rd Cir.-1963), and with *Southern Ry, v Fox*, 339 F. 2d 560 (5th Cir.-1965) is equally without merit.

In *Carney* the railroad contracted over a long period of time for the Y.M.C.A. in a distant town to provide room and board for the railroad's line-crews that were working regularly at a job-site in that town. All monthly bills were sent directly to the railroad which was obligated to furnish room and board to its employees. The plaintiff fell out of a defectively prepared bed and sued the railroad which was held liable for the negligence of its "agent" [the Y.M.C.A.] in maintaining the railroad's employees at the job-site. Undoubtedly the same result would be reached if a ship's crewmember was caused to fall out of his bunk due to the defective manner in which the room-steward had made-up the bunk. Such a result would be consistent because the crewmember's maintenance on the job-site - on the ship - would be vital to the physical operation of that ship. But the return - the repatriation of a seaman from a foreign country is not vital or crucial to the operation of the ship. Indeed, the vital thing is that the remaining seamen have to perform more work to keep the ship *in operation*. This was recognized by the California Court in *Mangrum v Union Pacific R.R. Co.*, 41 Cal. Rptr. 536, 230 A.C.A. 1033 (Cal. Dist. Ct. App.-1964), [discussed at Page 13 of the Petition], which states that "a railroad [ship] cannot *operate* properly without a full healthy crew."

Consequently there is no conflict between the Third Circuit and the Fourth Circuit's decision herein.

In *Southern Ry. v Fox*, a distributor of mimeograph machines (The Mimeograph Company) was engaged by the railroad to train and instruct railroad employees in the use and operation of a machine that printed passenger tickets for use throughout the Southern Railway System. Such tickets, of course, are essential to the operation of the railroad and maintenance of the franchise.

Fox, a railroad employee who had been trained and instructed by the distributor, was injured when he attempted to clean the machine while it was running. The Fifth Circuit observed that the railroad would be vicariously liable for the distributor's employees' negligence, if Fox had not been properly instructed in the use and cleaning of the machine. In reversing a judgment for the plaintiff on other grounds, however, the Court stated that the railroad was not an insurer of its employees while on duty but owed only the duty of reasonable care to furnish reasonably safe conditions, tools and appliances. Obviously no parallel can be drawn between *Fox* and the Petition. In anything, *Fox* teaches that the shipowner is not an insurer of its crewmembers while they are on duty, but owes only the duty to furnish reasonably safe conditions of work (transportation). Thus there is no conflict between the Fifth Circuit and the Fourth Circuit's decision herein.

The remaining case on which petitioners rely is *Leek* v *Baltimore & Ohio R.R.*, 200 F. Supp. 368, (N.D., W. Va. 1962) cited at Page 12 of the Petition. This District Court opinion was not appealed.

In *Leek* the railroad had contracted for over twelve years with a taxi company to transport a change of train crews every day between the railroad's main yards (where they were required to check in and out) and a switching yard (where they actually began and terminated active work) - a distance of approximately 20 miles. There was no question about the railroad's control over the twelve-year period. As *Sinkler* had held "switching" to be a "vital operational activity" of railroading, it was only logical that *daily transportation* of the switching crews (from the required check-in and check-out point to the site of actual

work and return) would likewise be a "vital operational activity" of a railroad. Thus the taxi was held to be an "agent" of the railroad.

There can be no correlation between *Leek* and the Petition. One involves a domestic railroad engaged in daily transportation over a twelve-year period in order to accomplish the switching - [the make-up and break-up of trains] - an operational activity that is essential to the franchise. The other involves an irregular and isolated occurrence - the use of a publicly licensed taxi in a foreign country to perform repatriation, a collateral function which is not "required" or "crucial" to the actual operation of a ship.

Consequently, *Carney, Southern Ry. v Fox* and *Leek* are not in point factually or in principle. Therefore there is no conflict with any other Circuit.

IV. The Court Of Appeals Decision Is In Accord With The Second Circuit, The Texas Court Of Appeals And With Applicable Principles Established By This Court.

There are two cases, *McCall v Overseas Tankship Corp.*, 222 F. 2d 441 (2nd Cir.-1955) and *Premeaux v Socony - Vacuum Oil Co.*,144 Tex. 588, 187 S. W. 2d 690, (Cir. Ct. App. - Texas - 1945) Aff'd., 192 S.W. 2d 133 (S. Ct. Texas - 1946) which are directly in point.

In *McCall,* a seaman discharged in Shanghi, was killed in a Northwest Airlines plane crash during the repatriation trip. The Second Circuit rejected the contention that the Airline's employees were *pro hac vice* servants or agents of the shipowner under the Jones Act and ruled that the shipowner's duty was to exercise ordinary and reasonable care in selecting a carrier to perform the transportation. Consequently, the Airline was an independent contractor

whose negligence was not imputable to the shipowner. The Court further ruled [222 F. 2d 441 at 444] that even if the seaman had not been discharged but had continued in the shipowner's employ during repatriation, the *pro hac vice* (agency) doctrine of the Jones Act would not apply.

In *Premeaux* the seaman fell sick on a foreign voyage and was repatriated on a ship of another company. He sued his employer under the Jones Act for injury allegedly resulting from improper care furnished him aboard the repatriating vessel. Deciding that the repatriating vessel was an independent contractor and could not be held to be an agent of the seaman's employe for the purpose of permitting the action under the Jones Act the Court said:

187 S.W.2d 690 at 698:

> "The Jones Act, by referring to and adopting relevant portions of the Federal Employer's Liability Act, 45 U.S.C.A. Sec. 51 et seq., which makes the employer liable for the negligence of his officers, agents and employees, may have enlarged the employer's liability in some instances (*DeZon v American President Lines,* 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065), but not where an independent agency has been employed. An independent contractor is not an officer, agent or employee within the meaning of the Federal Employers' Liability Act, at least, where the employer's duty is not absolute. *Chicago, R. I. & P.R. Co. v Bond,* 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735; *Robbinson v Baltimore & O. R. Co.,* 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; *Klar v Erie R. Co.,* 118 Ohio St. 612, 162 N.E. 798; *Rexroad v Western M.R. Co.,* 162 Md. 566, 160 A. 730; *Reynolds v Addison Miller Co.,* 143 Wash. 271, 255 P. 110.

The duty to furnish a seaman a safe place to work is not absolute and an employer is not an insurer of his employee's safety. On the contrary, the employer's duty is to exercise reasonable or ordinary care to provide its employees a safe place to work. *Wilkerson v McCarthy, et al, Trustees*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949). *Ellis v Union Pac. R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947). *Bailey v Central Vermont Ry.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, (1943).

Petitioners ask this Court to ignore *McCall* and *Premeaux*, to reverse the foregoing principles and to hold (1) that there is a duty to furnish an absolutely safe place to work (thus becoming an insurer), and (2) that as a matter of law, a shipowner's employment of a licensed common carrier (taxi) in a foreign country to perform an isolated instance of transportation over that foreign country's public highways, does not meet the test of reasonably safe facilities for a seaman's use.

To accept petitioners contention is to rule that a shipowner, faced with repatriation of an ill crew-member from a foreign country, may not delegate the performance of that repatriation to a foreign-licensed independent common-carrier which the shipowner does not own, operate or control, without the shipowner becoming an insurer of that common carrier. Petitioners cite no cases to support this contention!

Consequently the Question Presented (Infra, Page 2) has already been answered by the Second Circuit, by the Texas Court and by applicable principles established by this Court and the Fourth Circuit's decision is in accord therewith.

CONCLUSION

The grant of a writ of certiorari will require a re-determination of facts that were not disputed in the District Court nor contested in the Court of Appeals. There is no conflict with any prior decision of this Court nor with any decisions in any other Circuits and the decision of the Court of Appeals is in accord with existing precedent.

Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Excerpts from testimony of Arthur Rupert Carte as printed at pages 6a through 14a, Appendix, Petitioners' Brief in Fourth Circuit.

Pages 6a - 7a

Q. Mr. Carte, in connection with the transportation of ship's personnel, captains, crew members and so forth, does the Texaco Trinidad Incorporated have any automobiles of its own in the Marine Department for use?

A. No.

Q. Does not?

A. No.

Q. Well, how do you provide transportation for ship's captains and ship's personnel?

A. Well, if it's for the company, such as going to a medical hospital or medical center, the company does provide a car from the transport, but if it goes beyond the company's fence, outside the company's property, we always use taxis.

Q. And where do you get those taxis?

A. From San Fernando.

Page 14a

Q. Now, Mr. Babalas asked you how Abhiram was paid his—I ask you is he paid for each individual trip that he makes?

A. Yes.

Q. And the same with any other taxi company that you use?

A. Yes, sir.

Q. Then is the charge for that trip billed to that particular ship?

A. Yes, sir.

Q. And that ship's voyage into this port?

A. Yes, sir.

Q. Its a disbursement for the ship?

A. Yes, sir, it's charged to the ship's account.

Excepts from testimony of John Abhiram as printed at pages 24a through 30a, Appendix, Respondent's Brief in Fourth Circuit.

Pages 24a - 25a

Q. What's your name?

A. John Abhiram.

Q. Where do you live?

A. 32 Crichlow Street, San Fernando.

Q. At that address, do you live there?

A. Yes, sir.

Q. What all do you do there?

A. I run a taxi service.

Q. You keep your office and garage and run a taxi stand there?

A. Yes, sir.

Q. What business are you in?

A. Taxi.

Q. You say you're in the taxi business, how many taxis do you have?

A. Three.

Pages 28a - 29a

Q. Now, in your taxi business, for whom do you provide taxi services or transportation?

A. Well, I provide for whoever give the job; Texaco, Shell, Huggins Limited.

Q. Do you stay on a regular payroll for Texaco?

A. Oh no.

Q. How are you paid?

A. I'm paid by the job.

Q. By the job?

A. Yes, they give me one call or two calls for the week or three calls and I get paid by the call; whatsoever job I do for them.

Q. Now, when you are called for example from Texaco Trindad, which is here, what instructions do they normally give you at the time of a call?

A. Well, they give—if they want a car, the Marine or Shipping Department there, they call home and say they want a car at such and such time at the Shipping Office. When you go there, they give the instructions. What you have to do is take officers or papers to the Consul.

Q. Incidentally, do you know if Texaco Trinidad uses any other taxi operators?

A. Yes, sir.

Q. Then you don't get all of their business, do you?

A. No.

Pages 95, Line 18

Q. Do you pick up the general public with the taxi?

A. Oh yes. When I say pick up, only when I get a call. I don't run up and down the road.

Page 30a

Q. There are only two companies or two individuals that do work for Texaco for taxi driving?

A. Yes, sir.

Q. And do you have an agreement?

A. No, sir.

Q. Do you have an oral agreement with Texaco?

A. Well, sir, how do you say that again?

Q. Oral agreement?

A. What's oral, I don't understand what it means.

Q. Not in writing?

A. Not in writing.

Q. What's the oral understanding between you and Texaco?

A. Well, they give me business because they know I can carry out the business safely.

Q. The method of payment, do they pay you on each trip?

A. Each trip.

Q. Do they pay you by cash or by check?

A. They pay by voucher that you got to cash.